blinded by the erroneous "separate" and "severable" tests they believed to be applicable and as to which the Circuits are in conflict and controversy.

2. Finally, the Trial Court excluded the testimony of Mr. Lemons, an agent for the Respondent whom Petitioners had subpoenaed with his records dealing with the examination of the Petitioners' income tax returns for the year of the sale. The materiality of Agent Lemons' testimony as to values of inventory, receivables and other assets was stressed by Petitioners in the opening statement (R. 141a-142a), when it was offered on the trial (R. 176a-179a), and later on in the trial *after the Court had received evidence from the Respondent's witnesses as to the values unilaterally assigned by the purchaser to the same items.* (R. 214a-215a).

Counsel for Petitioner is unaware of any rule of evidence which holds a seller to a purchaser's unilateral values or which declares an Internal Revenue Agent incompetent as a witness in any court as to material facts within his knowledge. The fact that the testimony of an agent is not binding upon the Commissioner (Resp. 4, Footnote 3) is of no significance to a Court which is to pass upon the totality of the facts of a case. For the Trial Court to receive the Purchaser's values and to exclude this testimony as to an agreed determination of the seller's values stating (R. 177a-179a, 214a-215a): (1) that this evidence was not an estoppel on the commissioner; (2) that it was not binding upon the Court; (3) assuming the truth of Petitioners' position, the witness was not qualified to state an opinion as to a legal or factual judicial conclusion; and (4) that it was submitted for "coloration" makes it appear that the exclusion of the evidence by the Trial Court rested more upon the whimsical diversities of the Court than upon any legal or evidentiary rule distinguishing Mr. Lemons from

any other ordinary witness. None of the reasons stated was a sound judicial basis for the exclusion of the testimony of this witness. Any neophyte to the law should be aware that if it were possible for any witness to estop the Commissioner, bind the Court, or state an opinion as to a legal or factual judicial conclusion, we would have no need for Courts.

There is a need for Courts and especially for Trial Courts which will consider and hear "all" the evidence making identifiable evidentiary and ultimate findings of fact to support correct conclusions of law. The confusion presently existing within and among the Circuits as to the legal standards to be applied in covenant cases is not conducive to this need.

The Trial Court deprived these Petitioners of substantial justice by its disregard of evidence of the value of the good will of the business sold and by its exclusion of the testimony of the agent, Lemons. The decision of the tax court was clearly erroneous.

The Petition for Certiorari should be granted.

Respectfully submitted,

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